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IN THE

Supreme Court of the United States

October Term, 1972 No.

PENNSYLVANIA TRANSFER COMPANY OF PHILADELPHIA, INC., *Petitioner*

v.

ALFRED L. WHINSTON, DISTRICT DIRECTOR OF INTERNAL REVENUE, at Philadelphia, Pennsylvania, *Respondent*

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES:

The Petitioner, Pennsylvania Transfer Company of Philadelphia, Inc., respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Third Circuit entered in these proceedings on February 9, 1973.

The appellate court denied Petitioner's Petition for Rehearing on March 23, 1973.

OPINION BELOW

The opinion of the Court of Appeals, as yet unreported, appears at Addendum B, infra, pp. 17-18.

The District Court's opinion referred to by the Court of Appeals denying Petitioner's Complaint is reported at 337 F. Supp. 122, 72-1 U.S.T.C. 9473. (Filed 1/11/72). Copy appears at Addendum C, pp. 19-25.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on February 9, 1973. A Petition for Rehearing was denied by the Court on March 23, 1973.

The jurisdiction of this Court is involved under Title 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Did the lower court err in finding that the involved waivers for collection of the tax after assessment, which were contained in the five Offers in compromise filed by the Petitioner with the District Director of Internal Revenue were valid; and thereby finding against the Petitioner on its complaint?

2. Did the lower court err in not finding that the Petitioner's rights to due process as provided by the Fifth Amendment to the Constitution of the United States were violated by the Respondent?

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendment V.

"No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . "

STATEMENT OF THE CASE

The Petitioner, Pennsylvania Transfer Company of Philadelphia, Inc., filed its complaint with the District Court on March 10, 1971, requesting the Court to enjoin the District Director of Internal Revenue at Philadelphia, Pennsylvania, from levying upon, seizing and selling the Petitioner's property; to have the tax assessments against it declared null, void and invalid; and to secure the release of federal tax liens. 28 U.S.C. 1340, 2410, 2463; 26 U.S.C. 6861, Equity Powers; *Enochs v. Williams Packing Co.*, 370 U.S. 1, 7; 82 S. Ct. 1125, 1129; 8 L. Ed. 2nd 292.

The tax assessments are for the years 1951 to 1956, inclusive, and amount to $153,547.36, being specifically income taxes of $80,405.02, penalties of $41,715.23, and accrued interest of $31,427.11 up to June 29, 1962 when the assessments were made. The deficiencies for 1951 and 1952 have been paid.

There has never been a hearing on the merits of the assessments as the Internal Revenue Service has not initiated a court action for collection although it has been available to them to do so for the past eleven years.

During the intervening years, the Petitioner made five different offers in compromise to the District Director for settlement of the assessments, all of which were rejected. These offers were made on the Service's printed forms "656" which also contained a clause expressly waiving "any statute of limitations applicable to the assessment and/or collection of the liability sought to be compromised and suspending the limitations period while the offer was pending and for one year thereafter".

The offers (Form 656) were filed and rejected respectively as follows: (See Appendix, pages 32-36)

Filed	Rejected or Withdrawn
2/15/63	9/17/63
9/11/64	1/22/65
8/2/65	10/26/65
11/19/65	10/4/67
8/23/68	10/2/69

The Commissioner's Regulation 301:7122-1(F) provides that no offer in compromise will be received unless the Waiver is executed by the taxpayer.

The Internal Revenue Service officers, whose names appear in its Waiver clauses on the "offers", are Aloysius Courtney, Edmond B. Maio, Frank Veasey and John R. Gill. Mr. Gill is deceased. The other three testified under oath in depositions that they applied their signatures on the "offers" solely under powers of delegation from the District Director.

When shown the offer in compromise with Serial Number C-1:1966, Mr. Maio stated that the signature thereon, although being his name, was not put on or signed by him; that he knew nothing about it.

The factual record before the Court on the question involved consists principally of the Petitioner's sworn complaint, together with its attached exhibits, the five Offers in compromise, the depositions of the three internal Revenue officers, and the District Director's form of delegation of authority.

See Petitioner's "Appellant's Appendix" filed with the Court of Appeals, (Depositions; Pages 1-21):

Veasey	—	Page 37
Courtney	—	Page 38
Maio	—	Page 39

REASONS FOR GRANTING THE WRIT

1. The questions presented are of great importance in the administration of the Federal Tax laws, and settlement of these "often-arising questions", by this Supreme Court is in the public interest, for the petitioner's case is representative of a problem confronting many taxpayers and citizens.

2. The decisions below are in conflict with those of the Second and Ninth Circuit Courts of Appeals.

3. The decisions below violate the provisions of the Fifth Amendment to the Constitution of the United States pertaining to due process and equal protection of the law.

The Petitioner contends that the District Director of Internal Revenue at Philadelphia, Pennsylvania, failed, in the instant matter, to comply with the requirements of Title 26 U.S.C. 6502(a), Internal Revenue Code of 1954, as Amended, and the Commissioner of Internal Revenue Regulation 301:6502(a)(2)(i) promulgated to carry out the provisions of said Statute. The Petitioner does this because none of the five mentioned Offers in Compromise were signed personally by the District Director, nor were they even known to him.

The Petitioner submits that a review of the facts in this case make it clear that the Congressional command that the District Director, as the Secretary's Delegate, was solely delegated to execute the written agreements with the Petitioner to extend the time of limitations for the collection of the taxes based upon the assessments; and that the District Director could not subdelegate his authority.

It is further submitted that there was no review of the offers by him, nor any requisite consideration of the transactions at all by him. Needless to say, none of the abovementioned Revenue Officers come within the area or purview of the Congressional decree.

The District Director contends he can subdelegate his powers.

For him to prevail in this position, he must do so on the basis that there is statutory authority for the subdelegation of his power to such Revenue Agents and Officers. This he cannot do as there is none.

The Petitioner bases its contentions, firstly on the opinions of two other Circuit Courts of Appeals; they being the Second Circuit Court of Appeals in the case of *Lesser v. United States*, 368 F.2d 306; and the Ninth Circuit Court of Appeals in the case of *MacRohde a/k/a Max Ralph Rohde v. United States*, 415 F.2d 695.

In the lesser case, the Circuit Court states, *inter alia:*

> "* * * The result would be the same if the 1954 Code governs the question. Appellant's argument is that there is no power to subdelegate, comparable to Order 42 supra. The statute 6502, 1954 Code, gives the delegate of the Secretary power to sign. The implementing Regulation (Regs. 301:6502-1(a)(2)(i) is the actual delegation to the District Director. But there is no authority to subdelegate, and, presumably, even if there was evidence of an actual subdelegation to show, his signing as a subdelegate would not be effective because his superior lacked the power to delegate * * *."

The Circuit Court also cited the case of "In *Mondage Co. v. C.I.R.*, 50 F.2d 397, 399 (2d Cir. 1931). This Court said:

> "It will be presumed that the signatures were properly affixed—since it (sic) apparently was affixed by some one connected with the Department." Hence appellant had to come forward with some evidence indicating an absence of delegation. Since he did not, he cannot prevail."

In the instant case, it is submitted that the Petitioner has come forward with evidence proving that the Revenue

officers acted only under the belief that they were lawfully sub-delegated to do so, and were not acting in any ministerial or directory status. Such evidence contained in the Revenue officers' depositions certainly overcomes any presumption of regularity.

As said before, an examination of the waiver forms discloses none of them were signed by the District Director but were signed by an officer or employee purportedly delegated by the District Director; and that this procedure is not only loose but is directly contrary to the Statute and Regulation involved herein.

Section 6501(a) Title 26 U.S.C. provides that a proceeding for collection of Federal taxes must be begun (1) within six years after the assessment of the tax, or, (2) prior to the expiration of any period for collection agreed upon in writing by the secretary or his delegate and the taxpayer before the expiration of such six year period * * * the action is barred unless there was an effective agreement in writing within the meaning of the second clause of Section 6502(a).

The Commissioner's Regulation 301:6502(a)(2)(i) provides that the extension shall become effective upon execution of the agreement by both the taxpayer and the District Director. In the context of the Regulation "upon execution of the Agreement by both the taxpayer and the District Director the word means 'signed'."

As one can readily see from the said Statute and Regulation, the Secretary has appointed the District Director as his delegate and there cannot be, and is not, a sub-delegation permitted.

The Court of Appeals for the Ninth Circuit in the *MacRohde* cases held, *inter alia*,

> "* * * The Statute requires 'an agreement' of the taxpayer and the government. True 'agreement' does not mean 'contract' in this setting. It means expressed consent. But the statute is still unclear about the effect which the lack of expressed assent has upon the

validity of the waiver. That ambiguity is resolved by Treasury Regulation 301:6502(a)(2)(i) promulgated in 1956 which provides in pertinent part as follows: 'Collection after Assessment, (a) Length of Period—(2) Extension by Agreement, (i) the six year period of limitation on collection after assessment of any tax may, prior to the expiration thereof, be extended for any period of time agreed upon in writing by the taxpayer and the District Director. The extension shall become effective upon execution of the agreement by both the taxpayer and the District Director' * * *". "The Treasury Department could not have chosen plainer words to state that the event which makes the waiver operative is the signature of the District Director. It is his act in signing the waiver that stops 'the limitation's clock'."

If this were not so, the Court further held, the District Director by withholding his signature can avoid any appearance of consent to the terms of a waiver drafted by the taxpayer. He, and not the taxpayer, controls the event which tolls limitations when an offer in compromise is submitted.

The same conclusions should be held where, as in the instant case, it appears that the District Director has evaded his duty of execution by having subordinates sign for him. He could always avoid the agreement by saying he never signed or executed it; nor knew of it, or approved it.

The above Regulation was promulgated by the Commissioner as a guideline to taxpayers and for District Directors in the execution of such agreements and the government should be held to it.

Secondly, the opinions in the above cases are consistent with the ACCARDI doctrine which holds "An agency of the government must scrupulously observe rules, regulations or procedures which it has established. When it fails to do so, its action cannot stand and courts will

strike it down." See *Accardi v. Shaughnessy*, 347 U.S. 260, 74 S. Ct. 499, 98 L. Ed. 681 (1954). Here, the Supreme Court vacated a deportation order because the procedure leading to the order did not conform to the relevant regulations. The failure of the Board and of the Department of Justice to follow their own established procedures was held a violation of our due process. Also, the case of *Vitarelli v. Seaton*, 395 U.S. 535 (6/1/59).

One cannot justify non-compliance by the District Director with Regulations promulgated by the Commissioner of Internal Revenue and Secretary of the Treasury.

"Departures from departmental regulations in matters of this kind involve more than mere consideration of procedural irregularities; scrupulous observation of departmental procedural safeguards is clearly of particular importance." *Securities Exchange Commission v. Cheney Corp.*, 318 U.S. 80, 87, 87 L. Ed 626, 632, 633, 63 S. Ct. 454.

"An executive agency must be rigorously held to the standards by which it professes its actions to be judged." *Luhring v. Slotzback*, 304 F.2d 560. *John S. Service v. Dulles*, 354 U.S. 363.

The United States Court of Appeals for the Fourth Circuit, in the case of *U.S.A. Appellee v. Clark Eugene Heffner, Appellant*, 420 F.2d 809 (1970) followed the guideline of the Accardi doctrine. Also the United States District Court for the District of Massachusetts, in the case of *U.S.A. v. William Leahy*, 315 F. Supp. 388, which was affirmed by the Court of Appeals for the First Circuit, 434 F.2d 7 (10/7/70).

Petitioner still further submits that it can be seen and determined that the District Director of Internal Revenue, and his officers and agents, have acted in an unlawful, improper, and arbitrary manner, which acts are in violation of the Petitioner's Constitutional rights as provided by the Fifth Amendment to the Constitution of the United States pertaining to due process, equal protection of the law, and

the taking of its property illegally; and it is contended by the Petitioner that it was denied such constitutional rights. The Fifth Amendment holds, *inter alia*, "* * * nor to be deprived of life, liberty or property, without due process of law * * *."

It is submitted that the congressional purpose in passing the said statute, as well as the said Regulation, was to avoid judicial invalidation resulting from the absence of constitutionally sufficient standards, and, to eliminate questions of improper delegation of legislative authority.

The personal signature of the District Director is the Petitioner's safeguard against violation of its constitutional rights; so only the District Director and no one purported by delegation by him can sign and execute such collection waivers.

As said in *Commissioner of Internal Revenue v. United States Refactories Corporation*, 64 F.2d 69 (3rd Cir.), the requirement that the District Director's consent in writing was made for some purpose. This purpose might will be to prove that the terms of a waiver are those to which both taxpayer and Commissioner agreed, or perhaps Congress may have wished to protect the Commissioner from falling prey unknowingly to the terms which a taxpayer might impose in a waiver, the taxpayer's ability to impose such terms arising from the fact that, in the Court's eyes, he could force the Commissioner to bargain for an extension of the limitation period. The Commissioner's consent thus prevents the execution by taxpayer by waiver, which waives nothing and precludes the combination of the Commissioner's delay in collection.

Also, the 3rd Circuit Court in "*In re: Grand Jury Proceedings*, No. 71-1088 (filed May 28, 1971, slip opinion) stated,

> "* * * In a government of laws, existence of the government will be imperiled if it fails to observe

the law scrupulously. Our government is the potent, the omni-present teacher. For good or ill it teaches the whole people by its example. If the government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy * * *." Also, *Lewis v. Kugler, Jr.*, 3rd Cir. No. 71-1227, (opinion filed August 4, 1971).

Other cases that appear to support Petitioner's position are:

Zuber v. Allen, 90 S. Ct. 314, 323, 324, 328.
Bauer v. Foley, 404 F.2d 1215.
Florsheim v. U.S., 280 U.S. 453, 460; 50 S. Ct. 215, 74 L. Ed. 542.
United States v. Maney, 21 F.2d 28, 29.
Atlantic Mills of Rhode Island v. U.S., 3 F. Supp. 699 (1st Cir.)
Corn Products Refinery Co., 22 B.T.A. 605.
Botany Worsted Mills v. U.S., 278 U.S. 282, 49 S. Ct. 129; 73 L. Ed. 379.
Joint Anti-Facist Refugee Committee v. McGrath, 341 U.S. 123; 71 S. Ct. 624; 95 L. Ed. 817.
Smith v. Katzenbach, 351 F.2d 810.

Thirdly, this Honorable Court's attention is called to the criminal case of *United States of America v. Frank Narducci, et al.*, (Criminal No. 71-312, U.S. District Court for the Eastern District of Pennsylvania, Hon. Edward R. Becker, Judge, filed March 23, 1972), in which the Court granted the defendant's Motion to Suppress Evidence as the Attorney General of the Department of Justice did not comply with the step by step procedure set out by the Omnibus Crime Control and Safe Streets Act of 1968, for the use of wiretaps, which Petitioner believes supports his contentions, and *United States v. Robinson*, 468 F.2d 198 (Cr. No. 71-1058, 5th Cir., filed January 12, 1972).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari be granted.

Respectfully submitted

Robert M. Taylor

M. MARK MENDEL
ROBERT M. TAYLOR
Counsel for Petitioner

ADDENDUM "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-1193

PENNSYLVANIA TRANSFER COMPANY OF PHILADELPHIA, INC., *Appellant*

v.

ALFRED L. WHINSTON, DISTRICT DIRECTOR OF INTERNAL REVENUE AT PHILADELPHIA, PENNSYLVANIA, *Appellee*

PETITION FOR REHEARING

(F.R.A.P. Rule 40)

(Filing Date Extended To 3/9/73)

TO THE HONORABLE JUDGES OF THE SAID COURT:

* * *

2. This petitioner believes and submits that the lower court has misapprehended the powers given the District Director by its finding and deciding that, *inter alia*, ". . . Delegation Order No. 16, issued pursuant to Treasury Decision 6118, 1955-1 Cum. Bull. 698, 718-19 No. 22(b), and Delegation Order No. 42, 1952-2 Cum. Bull. 1378, make it clear that the waivers are valid . . ."; and in ordering and adjudging that the order of the District Court dismissing the complaint is "affirmed".

3. The District Director's Revenue officers testified that they based their authority to execute consents fixing the period of limitations on collection, contained in the government's offer in compromise forms solely upon the provisions contained in the District Director's Delegation Order No. 16, Revised, C.R. No. 56-1, Revised. The District Director indicates therein that his authority is derived from the "Commissioner's Delegation Order No. 42, and Treasury Decisions 6118 and 6172." (See Appellee's brief, p. 19, "Exhibit C".)

4. This attempted redelegation by the District Director, appellant contends, was done in error as he had no lawful authority to redelegate his sole, personal powers given him by Title 26 U.S.C. 6502(a)(2) and the Commissioner's Regulation 301:6502-1;

* * *

5. That the authority to delegate as contained in the aforesaid Delegation orders and Treasury Decisions became subordinate to and revoked by Regulation 301:6502-1(2)(i) when it was promulgated by the Commissioner of Internal Revenue.

The Court of Appeals for the Second Circuit in *Lesser v. United States*, 66-2 U.S.T.C. 9749, 268 F.2d 306, wherein the Commissioner's Delegation Order 42 (November 1, 1956, 56-1 Cum. Bull. 1378), was invoked in response to the appellant's argument that there is no power to subdelegate, comparable to Order 42 in the 1954 Code, held, *inter alia*,

> ". . . The Statute No. 6502, 1954 Code, gives the delegate of the secretary power to sign. The implementing regulation (Reg. 301:6502-1(a)(2)(i)) is the actual delegation to the District Director. But there is no authority to subdelegate, and presumably, even if there were evidence of an actual subdelegation to show, his signing as a subdelegate would not be effective because his superior lacked the power to delegate. . . ."

6. Also, in the case of *MacRohde et al. v. United States*, 69-2 U.S.T.C. 9628, 415 F.2d 695, the Court of Appeals in the Ninth Circuit, states, *inter alia*,

> ". . . The Treasury Department could not have chosen plainer words to state that the event which makes the waiver operative is the signature of the District Director. It is his act in signing the waiver that stops the limitations' clock . . ."; and ". . . no plausible explanation is made for the promulgation of the Regulation or for the drafting of Form 656-C unless both acts were intended to implement a statutory command and to provide guidance to the taxpayer as well as to the Commissioner. We attribute greater significance to a Treasury Regulation than to treat it as an interdepartmental memorandum. . . ."

7. As shown in the *MacRohde case*, the offer in compromise form containing the waiver clause holding that the waiver has to be signed by the Commissioner of Internal Revenue By "District Director of Internal Revenue "as his delegate". Whereas, in the instant case, the form has signature lines for the District Director and then "By ----". It is respectfully submitted that in accordance with the provisions of the 1954 Code, Section 65-2-1 and its Regulation, the signatures should be for the Secretary of the Treasury or by the District Director as his lawful and sole delegate.

8. It is believed Delegation Order No. 42, 1956, Cum. Bull. 1378 referred to by the government in its brief and letter to the Court of Appeals dated March 1, 1973, pertains only to years involved under the Internal Revenue Code of 1939, whereas, in the instant case, the actual years involved are 1954 and subsequent years, which come under the provisions of the 1954 Internal Revenue Code.

9. Treasury Decision 6118, it is submitted, was issued as a temporary rule until Regulation 301:6502-1, (a)(2)(i) was promulgated and put into effect. Further, that such

Regulation points out specifically that the District Director is the sole delegate of the secretary of the Treasury; and that it does not provide such a function may be performed by a District Director, a Regional Commissioner of Internal Revenue, an Assistant Commissioner of Internal Revenue, or by a designated officer or employee in such offices, or any such subdelegation (as an all inclusive provision).

10. It appears that Treasury Decision 6172, 56-1 Cum. Bull. 565 gives the authority for Regulation 301:6502-1 (a)(2)(i).

The preamble of the Treasury Decision states,

> "On July 29, 1955, notice of proposed rulemaking regarding the Regulations under Chapter 66 of the Internal Revenue Code of 1954, relating to limitations applicable to taxes imposed by such code, was published in the Federal Register (20 F.R. 5423), after consideration of such relevant suggestions as were presented by interested parties regarding the proposals, the following regulations are hereby adopted. The above Regulation is contained and included therein."

It appears therefrom that Treasury Decision 6118 was revoked by Treasury Decision 6172 and the new Regulation.

11. Nowhere in the statute or regulation, is there any interpretation that allows the secretary's delegate to subdelegate his authority and power. The power to execute the consent is left solely in the hands of the delegate who alone must exercise his authority. It is contended the Lower Court clearly erred in failing to apply the aforesaid Regulation here urged.

ADDENDUM "B"

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 72-1193

PENNSYLVANIA TRANSFER COMPANY OF PHILADELPHIA, INC., *Appellant*

v.

ALFRED L. WHINSTON, District Director of Internal Revenue, Philadelphia, Pennsylvania, *Appellee*

Appeal from the United States District Court for the Eastern District of Pennsylvania

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(D.C. Civil Action No. 71-569)

Submitted Under Third Circuit Rule 12(6)

February 8, 1973

Before: McLAUGHLIN, GIBBONS, Circuit Judges, and WEIS, District Judge

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JUDGMENT ORDER

In this suit to enjoin the District Director of Internal Revenue from collecting taxes, and to have assessments declared invalid, appellant contends that waivers of the statute of limitations executed by him on IRS Form 656 were invalid because signed by a delegate of the District

Director rather than personally. The district court rejected that contention and dismissed the complaint. Delegation Order No. 16, issued pursuant to Treasury Decision 6118, 1955-1 Cum. Bull. 698, 718-19 §22(b), and Delegation Order No. 42, 1952-2 Cum. Bull. 1378, make it clear that the waivers are valid.

It is ORDERED and ADJUDGED that the order of the district court dismissing the complaint is affirmed. Costs to appellee.

By the Court,

Circuit Judge

Attest:

Thomas F. Quinn
Clerk

Dated: February 9, 1973

ADDENDUM "C"

Opinion and Order

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

PENNSYLVANIA TRANSFER COMPANY OF PHILADELPHIA, INC. — Civil Action

v.

ALFRED L. WHINSTON, District Director of Internal Revenue — No. 71-569

Opinion and Order

HANNUM, J. — January 11, 1972

HANNUM, District Judge: This is an action by the plaintiff, Pennsylvania Transfer Company of Philadelphia, Inc., to enjoin the District Director of Internal Revenue from the collection of taxes, and to have the assessments against it declared invalid. The District Director of Internal Revenue charged the corporate plaintiff with fraud and filing false income tax returns for the years 1951 through 1957 based on the fact that the corporation's president diverted and embezzled substantial amounts of corporate income to his own use. In support of their position, plaintiff corporation contends:

1. That it is not chargeable with any illegal conduct committed by its president.

2. That its waiver of the statute of limitations included in Form 656—Offers-in-Compromise—is invalid.

The defendant has moved to dismiss the action because:

1. The Court does not have jurisdiction over the United States, the real defendant in this action.
2. Equitable jurisdiction of the Court does not obtain.
3. Title 26 United States Code, §7421, and Title 28 United States Code, §2201, act as a complete bar to the granting of the relief requested by plaintiff.

Title 26 United States Code, §7421(a) prohibits, with certain exceptions not here relevant, actions seeking to restrain the assessment or collection of any tax. In *Enochs v. Williams Packing & Navigation Co.*, [62-2 USTC ¶9545],[1] the Supreme Court held that a taxpayer might escape the prohibition of §7421(a) where "it is clear that under no circumstances could the Government ultimately prevail" and "equity jurisdiction otherwise exists". We feel that the plaintiff corporation has not met the first requirement.

The plaintiff, in support of its first argument, relies upon *Asphalt Industries, Inc. v. C. I. R.* [67-2 USTC ¶9620], 384 F. 2d 229 (3rd Cir. 1967). Under the facts in this case it was held that the conduct of the president of Asphalt, who had embezzled corporate income, could not be attributed to the corporation. The case did not involve consideration of 26 U. S. C. §7421(a). However, it is clear that whether or not the fraud of a corporate officer to evade payment of taxes can be attributed to the corporate taxpayer raises questions of law and fact. In *Enochs*, Mr. Chief Justice Warren stated:

> The manifest purpose of §7421(a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require

1. 370 U. S. 1, 7, 82 S. Ct. 1125, 1129, 8 L. Ed. 2d 292 (1962).

'hat the legal right to the disputed sums be determined i: a suit for refund. In this manner the United States is assured of prompt collection of its lawful revenue. Nevertheless, if it is clear that under no circumstances could the Government ultimately prevail, the central purpose of the Act is inapplicable and, under the *Nut Margarine case*, the attempted collection may be enjoined if equity jurisdiction otherwise exists. In such a situation the exaction is merely in 'the guise of a tax.' Id., 284 U. S. at 509, 52 S. Ct. at 263.

"We believe that the question of whether the Government has a chance of ultimately prevailing is to be determined on the basis of the information available to it at the time of suit. Only if it is then apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim, may the suit for an injunction be maintained. Otherwise, the District Court is without jurisdiction, and the complaint must be dismissed. To require more than good faith on the part of the Government would unduly interfere with a collateral objective of the Act—protection of the collector from litigation pending a suit for refund. And to permit even the maintenance of a suit in which an injunction could issue only after the taxpayer's nonliability had been conclusively established might 'in every practical sense operate to suspend collection of the . . . taxes until the litigation is ended.' *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U. S. 293, 299, 63 S. Ct. 1070, 1073, 87 L. Ed. 1407. Thus, in general, the Act prohibits suits for injunctions barring the collection of federal taxes when the collecting officers have made the assessment and claim that it is valid. *Snyder v. Marks*, 109 U. S. 189, 194, 3 S. Ct. 157, 160, 27 L. Ed. 901."

Upon the present state of the record[2] it is not apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim.

In support of plaintiff's second argument, two questions are raised.

> 1. Is the waiver of the statute of limitations (for collection of tax after assessment) submitted by the taxpayer as part of an Offer in Compromise valid where someone other than the District Director signs on his behalf pursuant to an express sub-delegation of authority by him?
>
> 2. Is Form 656, Offer in Compromise, which contains the waiver of the statute of limitation on the period of collection improperly prepared, ambiguous, and therefore an instrument with no legal effect?

The Pennsylvania Transfer Company of Philadelphia, Inc., has filed five Offers-in-Compromise with the Internal Revenue Service. Each of these offers was made on Form 656, drawn and supplied by the Internal Revenue Service. The Waiver of Collection involved herein is made a part of the Offer-in-Compromise, although it is a separate agree-

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2. As alleged in plaintiff's complaint, the common voting stock of Plaintiff Corporation was held at all times mentioned herein by the following parties and in the following amounts, to wit:

James M. Lee	899 shares
Thomas F. Lee	701 shares
Thomas F. Lee and Louise M. Lee, as Joint Tenants with Right of Survivorship and not as Tenants in Common	400 shares
Total	2000 shares

Thomas F. Lee is the president of plaintiff corporation and is the party charged with diverting and embezzling corporate income. Louise M. Lee claims that she had no knowledge of any fraud committed by her husband, received no benefits from same, nor condoned or ratified such acts of fraud if they actually happened.

ment. The statute which permits such agreements, 26 U. S. C. §6502(a), reads as follows:

> "(a) LENGTH OF PERIOD.—Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun—
>
> "(1) within 6 years after the assessment of the tax, or
>
> "(2) prior to the expiration of any period for collection agreed upon in writing by the Secretary or his delegate and the taxpayer before the expiration of such 6-year period (or, if there is a release of levy under section 6343 after such 6-year period, then before such release).
>
> "The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. The period provided by this subsection during which a tax may be collected by levy shall not be extended or curtailed by reason of a judgment against the taxpayer."

The implementing regulation, Reg. §301.6502-1 (a)(2)(i) reads as follows:

> "(i) The 6-year period of limitation on collections after assessment of any tax may, prior to the expiration thereof, be extended for any period of time agreed upon in writing by the taxpayer and the district director. The extension shall become effective upon execution of the agreement by both the taxpayer and the district director."

The record shows that none of the five agreements were signed by the District Director. The waivers were

signed by officers of the Internal Revenue under the authority of a document entitled "Delegation of Authority to Execute Consent Agreement Fixing the Period of Limitations on Collection," which was promulgated by the District Director.

The purpose of this delegation order was to delegate authority to sign consent agreements fixing the period of limitations on collection. Designated officers of the Internal Revenue were authorized to sign their names on behalf of the District Director of Internal Revenue to all consents fixing the period of limitations on collection, including consent provisions contained in Offer-in-Compromise and related collateral agreement forms. Plaintiff contends that to be effective, a Tax Collection Waiver must be signed personally by the District Director. We disagree, and believe the statute and regulation permit sub-delegation by the District Director. *United States v. Lee*, C. A. No. 69-2990 (E. D. Pa. 1971).

As to Form 656, although it may be more effective to include the waiver in a separate instrument or otherwise modify its structure, the language is clear wherein it states:

> "6. The undersigned proponent waives the benefit of any statute of limitations applicable to the assessment and/or collection of the liability sought to be compromised and agrees to the suspension of the running of the statutory period of limitations on assessments and/or collections for the period during which this offer is pending, or the period during which any installment remains unpaid, and for one year thereafter.
>
> "7. It is understood that this offer will be considered and acted upon in due course and that it does not afford relief from the liability sought to be compromised unless and until it is actually accepted in writing by the Commissioner or his duly authorized

representative, and the terms of the offer have been fully complied with.

"Waiver of statutory period of limitations is hereby accepted by the undersigned.

District Director of Internal
Revenue (Enter Name)

By (signature and title) Date

"I declare under the penalties of perjury that this offer (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

Signature(s) of Proponent(s)"

The designation "proponent" upon a reading of the entire document is clearly identified to mean the taxpayer. That the Government could make a better form is clear. As to the plaintiff's claim, however, we find no merit.

For the foregoing reasons we find that plaintiff has failed to state a claim upon which relief can be granted, and that 26 U. S. C. §7421(a) acts as a complete bar to plaintiff's cause of action.

ADDENDUM "D"

Title 26 USC 6501. (I.R.C. 1954)

LIMITATIONS ON ASSESSMENT AND COLLECTION

(a) General Rule.—Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

Title 26 USC 6502. (I.R.C. 1954)

COLLECTION AFTER ASSESSMENT

(a) Length of period.—Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun—

(1) within 6 years after the assessment of the tax, or

(2) prior to the expiration of any period for collection agreed upon in writing by the Secretary or his delegate and the taxpayer before the expiration of such 6-year period (or, if there is a release of levy under section 6343 after such 6-year period, then before such release).

The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. The period provided

by this subsection during which a tax may be collected by levy shall not be extended or curtailed by reason of a judgment against the taxpayer.

Title 26 USC 7421. (IRC 1954)

PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION

(a) Tax.—Except as provided in sections 6212(a) and (c), 6213(a), and 7426(a) and (b)(1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax eas assessed.

ADDENDUM "E"

Regulation 301:6502-1.

COLLECTION AFTER ASSESSMENT

(a) Length of period—

(1) General rule. In any case in which a tax has been assessed within the statutory period of limitation properly applicable thereto, a proceeding in court to collect such tax may be begun, or levy for the collection of such tax may be made, within 6 years after the assessment thereof.

(2) Extension by agreement. (i) The 6-year period of limitation on collection after assessment of any tax may, prior to the expiration thereof, be extended for any period of time agreed upon in writing by the taxpayer and the district director. The extension shall become effective upon execution of the agreement by both the taxpayer and the district director.

Regulation 301:7122-1(f).

Requirement with respect to statute of limitations. No offer in compromise shall be accepted unless the taxpayer waives the running of the statutory period of limitations on both or either assessment or collection of the tax liability involved for the period during which the offer is pending, or the period during which any installment remains unpaid, and for one year thereafter.

IN THE

United States Court of Appeals

For the Third Circuit

No. 72-1193

PENNSYLVANIA TRANSFER COMPANY OF PHILADELPHIA, INC., *Appellant*,

v.

ALFRED L. WHINSTON, District Director of Internal Revenue, Philadelphia, Pennsylvania, *Appellee*

(D. C. Civil Action No. 71-569)

SUR PETITION FOR REHEARING

Present SEITZ, Chief Judge, McLAUGHLIN, VAN DUSEN, ALDISERT, GIBBONS, ADAMS, ROSENN and HUNTER, Circuit Judges, and WEIS, District Judge.

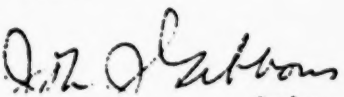
The petition for rehearing filed by

APPELLANT

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court

Dated: March 23, 1973



Judge

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1725

PENNSYLVANIA TRANSFER COMPANY OF PHILADELPHIA, INC., PETITIONER

v.

ALFRED L. WHINSTON, DISTRICT DIRECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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1. Petitioner instituted this action in the United States District Court for the Eastern District of Pennsylvania to enjoin the District Director of Internal Revenue from collecting taxes for the years 1951 through 1957, contending, *inter alia,* that the waivers of the statute of limitations with respect to those years mutually signed by its officers and Internal Revenue agents were invalid because the District Director lacked authority under Section 6502 of the Internal Revenue Code of 1954, 26 U.S.C. 6502, to delegate responsibility for signing such waivers. The district court held (Pet. App. 19-25) that the District Director has authority to delegate responsibility for executing waivers, that the waivers were therefore valid and the years in question still open for assessment, and that petitioner's suit was accordingly

barred by the anti-injunction statute, Section 7421 of the Code. The court of appeals affirmed *per curiam* (Pet. App. 17-18). Petitioner's only argument here concerns the authority of the District Director to delegate responsibility for execution of waivers of the statute of limitations.[1]

2. Section 6502(a)(2) provides that waivers are to be signed by the "Secretary or his delegate." The Secretary by regulation has delegated authority to sign to the District Directors. Treasury Regulations on Procedure and Administration, Section 301.6502-1(a)(2)(i), 26 C.F.R. 301.6502-1(a)(2)(i). However, Treasury Decision 6118, 1955-1 Cum. Bull. 698, 718-719, further provides that whenever any function is delegated to a District Director, he in turn has authority to redelegate the responsibility for such function to any officer or employee performing services under his supervision and control. Moreover, this authority to redelegate is explicitly provided with regard to the signing of waivers. See Delegation Order No. 42, 1956-2 Cum. Bull. 1378. This system accords with the practical necessities of administration.

Contrary to petitioner's claim, the decision below creates no conflict among the courts of appeals. Petitioner cites *Lesser* v. *United States*, 368 F. 2d 306 (C.A. 2), and *Rohde* v. *United States*, 415 F. 2d 695 (C.A. 9), as being in conflict with the court below, but *Lesser* expressly upheld a waiver signed by an Internal Revenue agent whereas *Rohde* merely held that

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[1] Petitioner does not contend that the authority was not properly delegated in accordance with normal internal operating procedures but only that any delegation by the District Director is necessarily invalid.

a waiver which had not been signed by any representative of the Internal Revenue Service was invalid.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1973.

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[2] The court in *Lesser* expressed the view that even if the waiver had not been signed by any Internal Revenue officer, it would be valid as a voluntary waiver by the taxpayer. Thus the delegation issue in *Lesser* was *dictum* in any event.